83-269

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CLAUDE HARVEY SEGREST, JR., PETITIONER

v.

PATSY SUE SEGREST, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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Counsel For Petitioner

August, 1983

QUESTIONS PRESENTED

1. Whether 10 USC 8929 and 8991 of themselves, from the moment of their enactment and so long as it they remained in force, operated to oust the jurisdiction of the state divorce court so as to stay its power to divide Petitioner's military non-disability retirement pay and thus make the action of the state court not merely erroneous but beyond its power, void, and subject to collateral attack.

2. Whether through the doctrine of *res judiciata*, a state court may frustrate the clear intent of Congress that military retired pay "actually reach the beneficiary" by the occasion of such state court's judgments and decrees becoming final? (i.e. whether a final state court decree is immune to federal preemption under Article VI, clause 2, U. S. Constitution.)

3. Whether individuals may frustrate the clear intent of Congress that military retired pay "actually reach the beneficiary" by an agreement incorporated in a final state court decree?

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CLAUDE HARVEY SEGREST, JR., PETITIONER

v.

PATSY SUE SEGREST, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The petitioner Claude Harvey Segrest, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas entered in this proceeding on April 13, 1983.

OPINION BELOW

The opinion of the Supreme Court of Texas appears in the Appendix hereto. (App. A. *infra*) No opinion was rendered by the Texas Court of Civil Appeals -- Waco. The judgment of the trial court in the proceeding appears in the Appendix hereto. (App. D. *infra*) The 1974 Divorce Decree awarding to Respondent a portion of Petitioner's military non-disability retirement pay also appears in the Appendix hereto. (App. C. *infra*)

JURISDICTION

The judgment of the Supreme Court of Texas was entered on April 13, 1983. A timely motion for rehearing was denied on May 25, 1983 as evidenced by the notice of the Clerk of said

Court appearing in the Appendix hereto (App. B, *infra*), and this petition for certiorari was diled within ninety (90) days of that date. The Court's jurisdiction is invoked under 28 USC§ 1257 (3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes and constitutional provisions:

United States Constitution, Article VI, clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . .shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code, Title 10:

> **§ 8929. Computation of retired pay: law applicable.**
>
> A member of the Air Force retired under this chapter is entitled to retired pay computed under chapter 871 of this title.
>
> **§ 8991. Computation of retired pay.**
>
> The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in secion 1401 of this title, he is entitled to be paid under

the applicable formula that is most favorable to him. Section references below are to sections of this title.

United States Code, Title 37:

> **§ 701. Members of Army or Air Force; contract surgeons.**
>
> (a) Under regulations prescribed by the Secretary of . . .the Air Force . . .a commisioned officer of . . .the Air Force may transfer of assign his pay account, when due and payable.

STATEMENT OF THE CASE

Petitioner entered the United States Air Force on August 21, 1957. On September 12, 1959 Petitioner and Respondent were married. The parties were divorced in Texas by the divorce decree entered February 12, 1974 (App. C, *infra*) which awarded to Respondent a portion of Petitioner's military non-disability retirement pay in violation of 10 USC 8929 and the clear intent of Congress that military retirement pay "actually reach the beneficiary" and was a "personal entitlement" of Petitioner. Said award was agreed to by the parties and no appeal from the decree was taken by the Petitioner.

On December 31, 1977, Petitioner retired from the Air Force as a Lieutenant Colonel and began receiving his military retirement pay on February 1, 1978. Since that time, Petitioner has paid to Respondent the preempted payments as ordered in said decree until August 1, 1981, at which time Petitioner filed suit in the State District Court for a declaration of his rights and obligations in view of this Court's decision of *McCarty* v. *McCarty*, 453 US 210 (1981) and tendered such payments into the registry of the State District Court pending determination of his obligation under the preempted decree.

The federal questions sought to be reviewed were raised

initially in the State District Court by Petitioner's pleadings. (App. E, *infra*) In the State District Court, the intermediate Appellate Court, and the Texas Supreme Court, Petitioner argued that at the time of the entry of the 1974 Divorce Decree, the State Court entering such decree lacked subject-matter jurisdiction to divest Petitioner of a portion of his military retirement pay, and that as a consequence, the portion of said divorce decree which purported to do so contravened Federal Statutes in violation of the Supremacy Clause of the United States Constitution. Therefore, since the 1974 trial court lacked such subject-matter jurisdiction, the part of its divorce decree awarding Respondent a portion of the Petitioner's military retirement pay was void, not merely voidable, and was subject to collateral attack. Furthermore, Petitioner pled and argued that an agreement of the parties which contravened federal law was also unenforcible and void.

Accepting this argument, the District Court found the challenged portion of the 1974 Divorce Decree and agreement thereto by the parties to be void. (App. D *infra*) The Court of Civil Appeals for Waco, Texas affirmed the District Court without written opinion on the subject of preemption.

The Texas Supreme Court granted Writ of Error and reversed the District Court judgment remanding the case to the District Court to determine the amount owed to Respondent (App.A *infra*) rejecting the Petitioner's argument that the 1974 Divorce Decree was preempted by Congressional enactment and therefore lacked subject-matter jurisdiction over Petitioner's retirement pay. The Texas Supreme Court held that the *McCarty* decision did not command retroactive application as to divorce decrees that were final before the U. S. Supreme Court announced its decision and which treat military retirement as community property. Therefore, the Texas Supreme Court found that the portion of the 1974 Divorce Decree dividing the Petitioner's military retirement was merely *erroneous* or *voidable*, not *void*, and as a result the 1974 Divorce Decree was entitled to its usual *res judicata* effect afforded to final *valid* judgments.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE U. S. SUPREME COURT AS TO THE PROPER APPLICATION OF THE PREEMPTION DOCTRINE.

The Texas Supreme Court Decision below holds that at the time of the 1974 Divorce Decree the state trial court had the power or authority and thus the subject-matter jurisdiction to divide the Petitioner's military retirement pay, which holding is in direct conflict with the United States Supreme Court's holding in *McCarty (supra)*[1] and *Kalb v. Feuerstein*, 308 U. S. 433 (1940)[2]

The decision below also holds that the doctrine of *res judicata* must prevail over the doctrine of preemption and that a final state court decree which conflicts with federal law is not preempted. This position conflicts with the United States Supreme Court's holding in *Ridgeway v. Ridgeway*, 454 U. S. 46 (1981)[3]

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[1] "So here, the right appellee asserts 'reverses the order of the statute' by giving the ex-spouse an interest paramount to that of the surviving spouse and children of the service member . . . Clearly, '(t)he law of the State is not competent to do this.' " *McCarty* at 101 S.Ct. 2741

[2] "The State cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Kalb* at 438-39

[3] ". . . a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments." *Ridgeway* at 55

The decision below further holds that the promotion of important federal interests is dependent upon whether the members of a class favored by federal legislation raise and contest an appeal urging a federal preemption defense in state court proceedings. This position conflicts with the holding in *Kalb* v. *Feuerstein (supra)*[4]

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING FEDERAL QUESTIONS.

The determination of whether the federal military retirement pay statute of itself ousted the jurisdiction of the State court so as to stay its power to divide Petitioner's retirement pay and therefore cause the state's action in this regard to be not merely erroneous but beyond its power, void and subject to collateral attack is a construction of that act and a Federal question. *Kalb* at 438

Post-*McCarty* decisions in Texas have been numerous and inconsistent. The early decisions of Courts of Civil Appeals found that final pre-*McCarty* decrees dividing military pay were preempted by Congress and thus void.[5]

Subsequent Texas cases, taking their lead from the 5th

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[4]"... congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor." *Kalb* at 444

[5]*Ex Parte Acree*, 623 S.W.2d 810 (Tex. Civ. App. - El Paso 1981, no writ)

Ex Parte Buckhanan, 626 S.W.2d 65 (Tex. Civ. App. - San Antonio 1981, no writ)

Circuit in *Erspan V. Badget*, 647 F.2d 550 (5th Cir. 1981) and culminating in the Texas Supreme Court decision below, found *McCarty* to be non-retroactive and that such final divorce decrees were entitled to *res judicata* protections, without discussing the doctrine of preemption.[6] One Texas appellate court, in dealing with preemption, formulated a bizarre theory of express and implied preemption, holding that *McCarty* involved "implied" preemption which does not affect prior final state court judgments, whereas "express" preemption would render such judgments void.[7] However, preemption was found by these courts in direct appeals from pre-*McCarty*

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[6]*Balazik v. Balazik*, 632 S.W.2d 939 (Tex. Civ. App. – Ft. Worth 1982, no writ) where Divorce Decree entered April 30, 1981 dividing Petitioner's military retirement pay was given *res judicata* effect because Decree became final July 14, 1981 by operation of Texas law (after *McCarty* decision on June 26, 1981) even though Petitioner attempted to prosecute an appeal.

Ex Parte Fordenbase, 635 S.W.2d 198 (Tex. Civ. App. – Tyler 1982, no writ)

Ex Parte Gaudion, 628 S.W.2d 500 (Tex. Civ. App. – Austin 1981, no writ)

Ex Parte Hovermale, 636 S.W.2d 828 (Tex. Civ. App. – San Antonio 1982, no writ)

Ex Parte Rodriquez, 636 S.W.2d 844 (Tex. Civ. App. – San Antonio 1982, no writ)

Ex Parte Welch, 633 S.W.2d 691 (Tex. Civ. App. – Eastland 1982, no writ)

Wilson V. Wilson, 667 F.2d 497, (5th Cir. 1982)

[7]*Ex Parte Hovermale*, (supra).

Divorce Decree[8] and post-*McCarty* partition cases where military retirement was not partitioned on divorce.[9]

Retired military officers in Texas have been dealt with unequally, depending upon their differing circumstances. For example: while pre-*McCarty* Texas law permitted partitions of military retirement pay *after* divorce where such pay was not dealt with upon divorce, post-*McCarty* cases deny such partition;[10] those officers involved in post-*McCarty* cases who prevailed in their collateral attacks[11] and whose favorable decisions were not appealed but have become final, now presumably have the protection of *res judicata* in not paying the preempted payments, while others must continue to pay; those who were divorced after *McCarty* and whose judgements become final *before* the enactment of the Former Spouses Protection Act 10 USC 1408 do not have to share their pre-

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[8]*Cameron V. Cameron*, 641 S.W.2d 210 (Tex. 1982)

In the Matter of the Marriage of Grant, 638 S.W.2d 254 (Tex. Civ. App. - Amarillo 1982, no writ) holding state trial court *had* subject-matter jurisdiction which was withdrawn while the action was pending" by the *McCarty* decision.

Mattern v. Mattern, 624 S.W.2d 400 (Tex. Civ. App. - Ft. Worth 1981, no writ)

[9]*Jeffrey v. Kendrick*, 621 S.W.2d 207 (Tex. Civ. App. - Amarillo, 1981, no writ)

Powell v. Powell, 620 S.W.2d 253 (Tex. Civ. App. - Waco, 1981, no writ)

Salmans v. Salmans, 643 S.W.2d 778 (Tex. Civ. App. - San Antonio 1982, no writ)

Trahan v. Trahan, 626 S.W.2d 485 (Tex 1981)

[10]*Id.*

[11]*Ex Parte Acree, (supra); Ex Parte Buckhanan, (supra)*

empted payments with their ex-spouse. The Texas Supreme Court has previously held that a final state court decree is no bar to preemption when dealing with Veterans Administration benefits,[12] but, without distinguishing those cases from the present case, denied Petitioner the benifit of preemption in the decision below. Truly, the state courts of Texas have not only succeeded in frustrating Congressional intent, but have frustrated the retirees as well.

Such inconsistency underscores the desirability of a thorough examination of the problem by this Court so that the retired military officers subject to pre-*McCarty* final divorce decrees may know their rights and obligations. Except for the aforementioned Texas cases holding final state court judgments void by reason of preemption and the one Texas case with a unique theory of "implied" and "expressed" preemption, the California courts and the Texas courts have exclusively referred to doctrines of repose and the need for the state to avoid the burdensome consequences associated with true preemption.

Here the 1974 Divorce Decree was void and unenforcible. State law having been preempted by the Congress, it was appropriate for the Petitioner to resist efforts to enforce the invalid portion of the 1974 Decree. A result which does not uphold such resistance mocks the principle that federal preemption constitutionally compels state law to yield to conflicting federal law in areas in which the Congress may properly legislate. It is not the Supreme Court which in *McCarty* preempted state law; that had long ago been done by the Congress. The *McCarty* decision only stated that which had existed all along but which had been ignored by the state divorce courts when they divided military retired pay.

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[12] *Ex Parte Burson*, 615 S.W.2d 192 (Tex. 1981)

Ex Parte Johnson, 591 S.W.2d 453 (Tex. 1979)

The question whether a final state court judgment which purports to award military retirement pay preempted by Congress and protected by the Supremacy Clause, is entitled to enforcement under doctrines of repose *(res judicata)* is important and has never been treated by this court. Lack of subject-matter jurisdiction in the State Court disposes of any question whether the 1974 Divorce Decree can retain any validity.

If the invalidity of the 1974 Decree is grounded upon jurisdictional considerations, it is clear that no question arises concerning the retroactive application of *McCarty*. Neither can *res judicata* be successfully interposed, since such doctrine depends upon a prior valid judgment, by a court having subject-matter jurisdiction.[13]

The successful interposition of doctrines of repose in a case where federal preemption has invalidated state law appears to have occurred only in cases in which a military retiree has attempted to invoke *McCarty*. California state courts[14] and for the most part Texas state courts have given no consideration to preemption doctrines in their post-*McCarty* analysis.

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[13]"In order that a judgment have the effect of *res judicata* it must be a valid judgment; the rule of *res judicata* has no applicaion to a void judgment, and a void judgment cannot serve as the basis for a valid plea of *res judicata*." 34 Tex. Jur.2d (Judgments), § 466

"A judgment is *res judicata* only as to such matters as the court that rendered it had jurisdiction to determine. Thus, for a judgment to be *res judicata*, the court rendering it must have had jurisdiction of the parties to the judgment and of the subject matter of the judgment. If it did not have jurisdiction, the judgment is void and cannot operate as *res judicata*; it neither binds, bars, nor estops anyone." 34 Tex. Jur.2d (Judgments) § 467

[14]*Sheldon* v. *Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (1981); *Mahone* v. *Mahone*, 123 Cal. App. 3d 17, 176 Cal. Rptr. 274 (1981); *Fellers* v. *Fellers*, 125 Cal. App. 3d 254, 178 Cal. Rptr. 35 (1981).

3. THE DECISION BELOW WAS ERRONEOUS UNDER SETTLED TEXAS LAW REGARDING LACK OF SUBJECT MATTER JURISDICTION.

The settled law in Texas is that when the inquiry in any case is as to whether the court pronouncing judgment has jurisdiction to do so, the question may be stated "Did the court have legal authority or power to pronounce the judgment under consideration?" The most usual statement of what makes judgments void (as distinguishable from voidable) in Texas is lack of jurisdiction over the parties, or some of them, or want of jurisdiction over the subject matter

But, whether really included in the first named condition, or not, there is a third (or supplemental) statement of like effect, and that is the absence of authority to award the particular relief which the judgment undertakes to grant. The decisions of the state of Texas hold that a void judgment is one entirely void within itself and which is not susceptible to ratification or confirmation and its nullity cannot be waived. Such is the judgment of a court having no jurisdiction over the subject matter ajudiciated.[15]

Furthermore, the current Texas Supreme Court has found final state court judgments no impediment to the application of the preemption doctrine when dealing with Veterans Ad

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[15]*Smith v. Paschal*, 1 S.W.2d 1086 (Tex. Comm'n App. 1928, opinion adopted)

Easterline v. Bean, 121 Tex. 327, 49 S.W.2d 427 (1932)

ministration benefits.[16] However, without attempting to make any distinction between Petitioner's military retired pay and Veteran's Administrations benefits, the court has found *res judiciata* a barrier to preemption in the present case.

The volume of cases in Texas and California ordering retired military officers to pay preempted payments under pre-*McCarty* final Divorce Decrees further highlights the significance of the questions here presented. It is estimated that hundreds of thousands of dollars are being diverted each month from the beneficiary intended by Congress to receive such payments, and are being given to ex-spouses under final state court decrees, which the Supremacy Clause declares must yield to federal legislation enacted to accomplish such intent.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Supreme Court.

Respectfully submitted,

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August, 1983

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[16] *Ex Parte Johnson* (supra)

Ex Parte Burson (supra)

APPENDIX A

IN THE SUPREME COURT OF TEXAS
NO C-1818

PATSY SUE SEGREST, Petitioner	§	
	§	FROM McLENNAN
V.	§	COUNTY
	§	
CLAUDE HARVEY SEGREST JR., Respondent	§	TENTH DISTRICT

This is an appeal from a suit filed for a declaratory judgment by a former husband seeking a determination of the validity and enforceability of a portion of a 1974 divorce decree. The decree incorporated a property settlement agreement treating military retirement benefits as part of the community estate of the parties. The trial court determined that pre-1981 divisions of military retirement pay are void and unenforceable in light of the United States Supreme Court decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). The court of appeals affirmed.[1] We reverse the judgments of the courts below, dismiss Claude Segrest's causes of action and remand Patsy Segrest's counterclaim to the trial court for proceedings in accordance with our opinion.

Claude and Patsy Segrest were divorced on February 12, 1974. The decree of divorce incorporated a contractual property settlement agreement dividing Mr. Segrest's non-disability military retirement benefits. On June 26, 1981, the United States Supreme Court held that military retirement benefits were not divisible as community property in a state court. *McCarty v. McCarty*, 453 U.S. 210. Thereafter, on or about August 1, 1981,

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[1]The court of civil appeals decision is unpublished. TEX. R. CIV. P. 452.

Mr. Segrest discontinued payments to his former wife as required by the settlement agreement. The present proceedings were instituted on October 16, 1981. Mrs. Segrest counterclaimed, seeking enforcement of the pre-divorce contractual settlement agreement.

The trial court rendered judgment declaring both the portion of the 1974 decree awarding Patsy Segrest an interest in Claude Segrest's retirement pay and the incorporated pre-divorce property settlement agreement to be void and unenforceable. No statement of facts was filed in anticipation of appeal. The court of appeals summarily affirmed the trial court's judgment without addressing any of the points of error raised by Patsy, stating "(i)n the absence of a statement of facts, it must be presumed on appeal that the evidence introduced at the trial supports the findings and judgment of the court."

The court of appeals erred in not considering Mrs. Segrest's points of error. TEX. R. CIV. P. 451. Rule 371 requires that a statement of facts be filed only where necessary to the appeal. TEX. R. CIV. P. 371. The rule applies to issues which require reference to the evidence and not to matters which are strictly questions of law. No issues of fact were raised at trial. While the court of appeals has not disposed of the points raised by petitioner, these points *present only questions of law*. We may, therefore, dispose of them now instead of requiring the parties to go back to the court of appeals and then possibly return here with a second application for writ of error. *McKelvy v. Barber*, 381 S.W.2d 59, 65 (Tex. 1964).

Patsy Segrest, the petitioner, raises two points of error concerning the propriety of her former husband's suit. By her first point, Mrs. Segrest contends that a suit for declaratory judgment may not be used to collaterally attack a final judgment. It is well established that a voidable judgment is not open to collateral attack, but can only be corrected by direct review. *Ex parte Sutherland*, 526 S.W.2d 536 (Tex. 1975). Moreover, the right to declaratory relief is subject to the rule of *res judicata*.

Cornell v. Cornell, 413 S.W.2d 385 (Tex. 1967). We must, therefore, determine the validity of the 1974 decree before determining the propriety of Mr. Segrest's action and the applicability of the doctrine of *res judicata*. By her second point of error, Mrs. Segrest contends that the *McCarty* decision does not command retroactive application, and as such the portion of the 1974 divorce decree dividing the military retirement benefit is merely *voidable*, not *void*. We agree.

A review of the relevant United States Supreme Court decisions indicates that *McCarty* was not intended to be retroactive. None of the cases involving the question of federal law preemption of state community property law indicate an intent to invalidate or otherwise render unenforceable in retroactive fashion all prior valid and subsisting state court judgments. *See Ridgway v. Ridgway*, 454 U.S. 46 (1981); *McCarty v. McCarty*, 453 U.S. 210; *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *Yiatchos v. Yiatchos*, 376 U.S. 306 (1964); *Free v. Blank*, (sic)369 U.S. 663 (1962); *Wissner v. Wissner*, 338 U.S. 655 (1950); *McCune v. Essig*, 199 U.S. 382 (1905).

In *Chevron v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the Supreme Court set out a three-pronged test for determining whether and to what extent a judicially modified or abrogated rule of law should be given retroactive operation: (1) whether the holding in question "decid(ed) an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases; (2) "whether retrospective operation will further or retard [the] operation" of the holding in question; and (3) whether retroactive application "could produce substantial inequitable results" in individual cases. 404 U.S. at 105-08. *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, _____ U.S. _____, 102 S.Ct. _____, 73 L.Ed2d 598 (1982); *Ciprano v. City of Houma*, 395 U.S. 701 (1969); *Linkletter v. Walker*, 381 U.S. 618 (1965); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

The question as to what effect should be given a division of military benefits awarded in a final divorce decree was discussed in *Erspan v. Badgett*, 647 F.2d 550, *reh. denied en banc*, 659 F.2d 26 (5th Cir. 1981), and *Wilson v. Wilson*, 667 F.2d 497 (5th Cir. 1982), *cert. denied*, _____ U.S. _____, 102 S.Ct. 3485 (1982). *Erspan* involved an appeal from a judgment enforcing a decree finalized before *McCarty* was decided, and which divided retirement benefits. Relying on *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), the federal court of appeals held that the divorce decree was entitled to its usual *res judicata* effect. A final judgment settles not only issues actually litigated, but also any issues that could have been litigated. That the judgment may have been wrong or premised on a legal principle subsequently overruled does not affect application of *res judicata*. 659 F.2d at 28. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. at 398-99; *Trahan v. Trahan*, 626 S.W.2d 485, 487-88 (Tex. 1981).

The holding of the Fifth Circuit Court of Appeals was the same in *Wilson*. The Wilsons were divorced in a Texas state court in 1970. Pursuant to an agreed property settlement agreement (as we have in the instant case), the trial court awarded Mrs. Wilson $226.25 per month from her husband's military retirement pay, which was to commence in 1971. No appeal was made from that judgment. Mrs. Wilson never received a payment, and brought a successful suit in federal court. On appeal, Mr. Wilson urged the same *McCarty* argument Mr. Segrest now presents to us. Citing 28 U.S.C.A. § 1738, which requires that final state judgments be accorded full faith and credit, the court of appeals concluded that the Texas state court judgment was *res judicata* of the suit at bar. 667 F.2d at 498.

Within the parameters established by *Chevron* and *Federated Department Stores*, we are persuaded to follow the decisions of the Fifth Circuit Court of Appeals in *Erspan* and *Wilson*. The decision in *McCarty* does not command retroactive application as to divorce decrees which were final before the Supreme Court announced its decision and which

treat military retirement benefits as community property.[2] The *McCarty* decision, being a case of first impression, could not have been foreseen. Retroactive application would place an inequitable burden upon their ex-spouses for whom divisions of the community estate were based upon the assumption that military retirement benefits constituted a community asset.

Having determined that *McCarty* v. *McCarty*, 453 U.S. 210, does not operate retroactively, the Segrests' 1974 divorce decree should be viewed as being *erroneous* or *voidable*, as opposed to *void*. *Austin Independent School District* v. *Sierra Club*, 495 S.W.2d 878, 882 (Tex. 1973). Consequently, the rule of *res judicata* is applicable. Mr. Segrest's suit for declaratory judgment is therefore not a remedy available to him to set aside the final decree of divorce rendered in 1974. *Sutherland* v. *Sutherland*, 560 S.W.2d 531, 533 (Tex. Civ. App. -- Texarkana 1978, writ ref'd n.r.e.). Being a final, unappealed and valid judgment, Mr. Segrest's suit for declaratory judgment constitutes both an improper as well as impermissible collateral attack upon the 1974 decree of divorce.

The judgments of the courts below are reversed and judgment is rendered dismissing Claude Segrest's suit for declaratory judgment. That part of the judgment is severed. The portion of the case concerning Patsy Segrest's counterclaim for enforcement of the settlement agreement is remanded to the trial court to determine the amounts owed to her.

C. L. Ray, Justice

Opinion Delivered: April 13, 1983

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[2]Title 10, section 1408 of the Department of Defense Authorization Act of 1983 makes *McCarty* nugatory with respect to its application to judgments rendered after the date of the decision. *Cameron* v. *Cameron*, 641 S.W.2d 210 (Tex. 1982); 10 U.S.C.A. §1408 (c)(1); 128 Cong. Rec. H5999-6000 (daily ed. August 16, 1982, conference explanation).

APPENDIX B

THE SUPREME COURT OF TEXAS

P.O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

May 25, 1983

Mr. Derrel J. Luce, Attorney
5400 Bosque Blve. - Suite 155
Waco, Texas 76710

Mr. Philip R. Segrest, Attorney
6609 Santer Avenue
Waco, Texas 76710

Dear Sirs:

The motion for rehearing in the case of PATSY SUE SEGREST vs. CLAUDE HARVEY SEGREST, JR., No. C-1818, was this day overruled.

Very truly yours,

Signature - Garson R. Jackson
Garson R. Jackson Clerk

APPENDIX C

C-1

NO 73-2135-1

IN THE MATTER OF	§	In The District Court Of
THE MARRIAGE OF	§	
CLAUDE HARVEY SEGREST, JR.	§	McLennan County, TX
and	§	
PATSY SUE SEGREST	§	19th Judicial District

DECREE OF DIVORCE

On this the 12th day of February, 1974, came on to be heard the above styled and numbered cause, and came the Petitioner in person and by attorney and announced ready for trial, and the Respondent, having waived issuance and service of citation by waiver duly filed herein, did not appear but wholly made default.

The Court, after examining the records herein and listening to the evidence and argument of counsel, finds that it has jurisdiction over this cause and the parties hereto and that Petitioner's Original Petition for Divorce has been on file in this Court for at least sixty (60) days.

The Court finds that at the time of the filing of this suit, Petitioner has been a domiciliary of this State for the preceding twelve month period and a resident of the County of McLennan in which this suit was filed for the preceding six month period.

No jury having been demanded by either of the parties hereto, the Court proceeded to try this cause. All matters in controversy herein, including all questins of fact and of law having been submitted to the Court, and the Court having read the pleadings and heard the evidence and argument of counsel, is of the opinion that the material allegations in Petitioners Original Petition for Divorce, as filed herein, are substantially correct and have been proved by full and satisfactory evidence. The Court finds that a divorce should be granted, severing the bonds of matrimony between the parties.

IT IS THERFORE, ORDERED, ADJUDGED AND DECREED by the Court that the bond of matrimony heretofore existing between the Petitioner, Claude Harvey Segrest, Jr. and Respondent, Patsy Sue Segrest, be, and are hereby, dissolved, and a decree of divorce is hereby granted.

The Court finds that there was born to or adopted by the parties of this marriage one child now under the age of eighteen years, a daughter, Julia Ann Segrest, born September 21st, 1970, and that her custody should be awarded to Respondent, subject to the right of Petitioner to visit with said child at all reasonable times and places.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the custody and control of the minor child, Julia Ann Segrest, be, and is hereby, awarded to the Respondent, subject to the right of the Petitioner to visit with said child at reasonable times and places; and it is further ORDERED, ADJUDGED AND DECREED by the Court that Petitioner pay child support through the Clerk of the Court in the sum of $200.00 per month payable monthly with the first such payment being due and payable on the 10th day of February, 1974, with a like payment being due and payable on the 10th day of each succeeding month thereafter, until said child shall reach the age of 18 years, or until further order of this Court.

The Court further finds that the parties own community property and that said property has been divided by agreement of the parties hereto, which the Court finds to be fair, just and equitable, such division as follows:

Petitioner agrees to pay all outstanding debts of the parties to date hereof not otherwise agreed to, and Petitioner shall own as his separate property and estate, Respondent releasing any right, title and interest therein, the following: (1) 1973 Oldsmobile Cutlass; (2) 1947 Willys Jeep; (3) 1965 Buick Riviera; (4) Twenty Nine U.S. Savings Bonds of $25.00 each; (5) Title to the following mining claims in the Quartz Creek Mining

District, Gunnison, Co., State of Colorado, subject to existing road easements thereon for use by Respondent, being: (a) Virginia. No. 6 including cabin, contents, all improvements and other personal property thereon; and (b) Virginia Nos. 4 and 5 and the remaining portions of Virginia Nos. 3 and 7 not set apart to Respondent, together with improvements thereon, if any; (6) Shares of Mass. Investors Growth Mutual Funds not herein given to Respondent; (7) One-half of net proceeds from sale of residence of the parties as hereinafter described, after deducting therefrom an amount not to exceed $3,000.00 with which to pay for an automobile for Respondent as her separate property; (8) Income Tax Refund for CY 1973; (9) Savings Account No. 404 7494 in The First National Bank, Waco, Texas; (10) Guns, Canon cameras, Sansui Stereo, tools, camping gear and equipment, Petitioner's personal effects, filing cabinet, Vietnamese painting, one-half of all books, one-fourth of all records, black and white TV, and other items jointly agreed upon.

If at any time in the future either the Petitioner or the Respondent desires to sell any portion or all of the real estate awarded to such a party in the Decree, the party desiring to sell shall notify the other party thereof by certified mail sent to the last known address of said party. The other party shall have the option to purchase said real estate for 30 days following the mailing of such notice. If said option is not exercised within the 30 day period, the selling party may sell to a third party.

Respondent shall own as her separate property and estate, the Petitioner releasing any and all right, title and interest therein the following: (1) Title to Lot No. 22, Mount Lemmon Estates, in Pima County, State of Arizona; (2) Title to the following patented mining claims located in the Quartz Creek Mining District in the County of Gunnison, State of Colorado, together with road easement on existing roads on said property set apart to Petitioner in said Quartz Creek Mining District, being the northerly ¼ of the Virginia, the northerly ¼ of the Virginia No. 2 and the northerly ¼ of the Virginia No. 8, the northerly ½ of

the Spring No. 1, the southerly portions of the Virginia No. 7 and the Virginia No.3, south of a line connecting the following two points: (a) a point on the eastern boundary of the Virginia No. 7, 840 feet from the southeast corner of the Virginia No. 7 and (b) a point on the western boundary of the Virginia No 3, 840 feet from the southwest corner of the Virginia No. 3; (3) Fifty-eight (58) $25.00 U.S. Savings Bonds of which 29 are to be used for Julia Ann Segrest; (4) 118 shares of Mass. Investors Growth Mutual Funds; (5) Sufficient sum not to exceed $3,000.00 for purchase of automobile by the Respondent, to be deducted from the net proceeds on sale of said residence of the parties, located at 1816 Embudo Drive, N.E., in Albuquerque, New Mexico; (6) ½ of the remaining proceeds from sale of said residence, after deducting said purchase price of automobile; (7) Household goods jointly owned by the parties now located at said residence, except such items as described herein set apart to Petitioner; (8) A portion of Petitioner's Retirement Pay, payable as received, using the following formula: One-half (½) times the number of months the parties were married to each other divided by the number of months of Petitioner's active military service counting toward retirement times the monthly gross amount of retirement pay received by Petitioner

$$\left(\frac{1}{2} \times \frac{\text{number of months married}}{\text{number of months of active military service}} \times \text{gross monthly retirement pay}\right).$$

The Petitioner will make the necessary arrangements to insure that the child of the parties is entitled to medical treatment during the period that he is in the active military service and if such medical treatment is discontinued in the future, the Petitioner will maintain hospitilization and major medical insurance coverage for the minor child of the parties until she reaches the age of eighteen years.

The Petitioner will continue to maintain the life insurance coverage which he has at the present time with Julia Ann Segrest, the minor child of the parties, as beneficiary until such

time as he may remarry. In the event of the remarriage of the Petitioner he will continue to maintain life insurance coverage on his life in the amount of $5,000 with Julia Ann Segrest as the beneficiary.

All costs of Court expended in this cause are hereby adjudged against Petitioner, for which execution shall issue if not timely paid.

Petitioner will pay Respondent's reasonable attorney's fees.

Each party will execute all documents necessary to carry out the orders set out in this decree.

SIGNED, RENDERED AND ENTERED this the 12th day of February, 1974.

Signature

Presiding Judge

Approved for Petitioner:
Signature - Claude H. Segrest, Jr.

Approved for Respondent:
Signature - Patsy S. Segrest

APPENDIX D

D-1

NO. 81-2945-1

CLAUDE HARVEY SEGREST, JR.	§	In The District Court
	§	
V S .	§	McLennan County, TX
	§	
PATSY SUE SEGREST	§	19th Judicial District

JUDGMENT

On the 16th day of April, 1982, came on to be heard the above-entitled and numbered cause and Claude Harvey Segrest, Jr., Plaintiff, appeared in person and by attorney of record and announced ready for trial, and Patsy Sue Segrest, Defendant, appeared by attorney of record and announced ready for trial and no jury having been demanded, all matters of fact and things in controversy were submitted to the Court.

The Court, after hearing the evidence and arguments of counsel is of the opinion that Plaintiff is entitled to judgment as prayed for.

The Court further finds that by Order dated February 11, 1982, Plaintiff paid into the Registry of this Court the sum of $3,682.00. Subsequently, Plaintiff paid into the Registry of the Court an additional $1,098.02, for a total amount paid into the Registry of the Court of $4,780.02, representing that portion of Plaintiff's military non-disability retirement benefits set aside to Defendant under Divorce Decree entered February 12, 1974, in Cause No. 73-2135-1, in the District Court of McLennan County, Texas, 19th Judicial District, entitled In the Matter of the Marriage of Claude Harvey Segrest, Jr. and Patsy Sue Segrest, which had accrued since August 1, 1981. The Court further finds that by Order dated April 21, 1982, subject to final resolution of this case and further order of this Court, Defendant was permitted to withdraw all funds then being held in the Registry of the Court totalling $4,780.02.

It is, therefore, ORDERED, ADJUDGED and DECREED that that portion of the Decree of Divorce signed, rendered and entered on February 12, 1974, in the 19th Judicial District Court of McLennan County, Texas, in Cause No. 73-2135-1, In the Matter of the Marriage of Claude Harvey Segrest, jr. and Patsy Segrest, which purports to award to Patsy Sue Segrest and divest Claude Harvey Segrest, Jr. any and all right, title and interest in and to a portion of Plaintiff's retirement pay, payable as received, using the formula therein set forth is hereby declared to be unenforceable, null and void, and is hereby set aside and declared for naught.

It is further ORDERED that any property settlement agreement made in anticipation of said divorce or incorporated in the aforementioned Decree is also declared to be unenforceable, null and void, and is hereby set aside and declared for naught.

It is ORDERED that Plaintiff's obligations to make payments into the Registry of the Court as ordered by this Court is hereby terminated and released.

It is further ORDERED that within thirty (30) days from the date of this judgment, the Defendant, Patsy Sue Segrest, shall pay into the Registry of this Court the sum of Four Thousand Seven Hundred Eighty and 02/100 Dollars ($4,780.02) representing the funds paid by Plaintiff into the Registry of this Court and withdrawn by Defendant pursuant to Court order subject to final resolution of this case and further order of the Court. It is further ordered that upon receipt of said funds, the Clerk shall pay said funds to the Plaintiff, Claude Harvey Segrest, Jr. through his attorney of record, Philip R. Segrest, 6609 Sanger Avenue, Waco, Texas 76710.

It is further ORDERED, ADJUDGED and Decreed by the Court that Plaintiff, Claude Harvey Segrest, Jr., have and recover from Defendant, Patsy Sue Segrest, the aforementioned sum of Four Thousand Seven Hundred Eighty and 02/100

Dollars ($4,780.02). If said judgment is not paid within thirty (30) days from the date hereof by Defendant paying said sum into the Registry of this Court as heretofore ordered, all writs and processes for the enforcement and collection of said judgment or the costs of court may issue as necessary.

It is further ORDERED that the judgment hereby rendered shall bear interest at the rate of nine percent (9%) from the date of judgment until paid.

All costs of court expended or incurred in this cause are hereby adjudged against Defendant. All other relief not expressly granted herein is denied.

Signed this 2nd day of June, 1982.

Derwood Johnson
Judge Presiding

APPROVED AS TO FORM:

WASH & SEGREST, P.C.
6609 Sanger Avenue
Waco, Texas 76710
(817) 776-3611

By: Philip R. Segrest
Philip R. Segrest

ATTORNEYS FOR PLAINTIFF

DERREL LUCE, ATTORNEY AT LAW
5400 Bosque Boulevard, Suite 460
Waco, Texas 76710
(817) 772-6853

By: _____
Derrel Luce

ATTORNEY FOR DEFENDANT

APPENDIX E

NO. 81-2945-1

CLAUDE HARVEY SEGREST, JR.	§	In The District Court
	§	
VS.	§	McLennan County, TX
	§	
PATSY SUE SEGREST	§	19th Judicial District

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Claude Harvey Segrest, Jr., Plaintiff, files this action in which Patsy Sue Segrest, Defendant, is a necessary party and for cause of action would show the Court as follows:

I.

Plaintiff is an individual residing in Albuquerque, New Mexico. Defendant is a party having an interest in the matter made the subject of this action, and resides at Troy House, 350 Cap-au-Gris, Troy, Missouri. Defendant has engaged in business in Texas as hereinafter set forth. Defendant does not maintain a place of regular business in this state or a designated agent upon whom service may be had upon cause of action arising out of such business. Therefore, Defendant may be served with citation by service upon the Secretary of State pursuant to Article 2031b(3), Revised Civil Statutes of Texas.

II.

FACTUAL ALLEGATIONS

On or about February 12, 1974 in Cause No. 73-2135-1, this Honorable Court entered a Decree of Divorce dissolving the marriage of the parties hereto. Plaintiff and Defendant signed the Decree of Divorce approving the terms thereof pertaining to property division and more specifically pertaining to the division of Plaintiff's military non-disability retirement pay. A

copy of said Decree of Divorce is attached hereto as Exhibit "A" and incorporated herein for all purposes.

III.

In *McCarty v. McCarty*, 49 U.S. Law Week 4850, the United States Supreme Court held that federal law precluded this Honorable Court and the parties from dividing Plaintiff's military non-disability retirement pay pursuant to the state community property laws.

IV.

DECLARATORY RELIEF

Plaintiff petitions the Court pursuant to the Uniform Declaratory Judgment Act, Article 2524-1, Revised Civil Statutes of Texas for a declaration that the terms of the Decree of Divorce pertaining to the division of Plaintiff's military non-disability retirement pay are void and unenforceable because this Court did not have jurisdiction to render that particular judgment; and that the parties approval to such terms do not constitute a binding contract, or if it did constitute a contract, that such contract is unenforceable because it was in violation of the United States Constitution, federal law and public policy; and that Plaintiff's liability, if any, to Defendant under such terms be extinguished.

V.

REFORMATION

In the alternative, Plaintiff contends that, if such approval constituted a valid contract, there existed at the time of execution thereof, a mutual mistake of fact that this Honorable Court had jurisdiction to divide Plaintiff's military non-disability retirement pay. Therefore, the contract, if any, between the parties should be reformed to delete the terms thereof pertaining to the division of Plaintiff's military non-disability retirement pay.

VI.

REQUEST FOR TENDER

Plaintiff has faithfuly paid to Defendant the portion of Plaintiff's military non-disability retirement pay pursuant to the Decree of Divorce up to and including July 1, 1981. Plaintiff is in possession of such payments due beginning August 1, 1981 and proposes to withhold such future payments until this matter is resolved by this Court. Plaintiff requests permission to pay such funds into the registry of this Court pending final decision of this Court or by court of final appeal.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited to appear and answer herein, and that upon final hearing, Plaintiff have judgment as follows:

1. A declaration that the division of Plaintiff's military non-disability retirement pay either pursuant to the Decree of Divorce or contract, if any, is void and unenforceable, and that Plaintiff is not liable to pay Defendant any sums due upon the terms of the Divorce Decree or contract, if any, pertaining thereto.

2. In the alternative, that the contract, if any, between Plaintiff and Defendant be reformed to delete any agreement pertaining to the division of Plaintiff's military non-disability retirement pay.

3. For costs of suit incurred herein.

4. For such other and further relief, both at law and in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,
Wash & Segrest, P.C.
6609 Sanger
Waco, Texas 76710
(817) 776-3611

BY: Signature - Philip R. Segrest
Philip R. Segrest
State Bar #17996000